



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAMES D CHAVEZ,

Petitioner,

v.

D. DAVEY, Warden,

Respondent.

No. CV 18-4021 SJO (FFM)

ORDER TO SHOW CAUSE WHY
PETITION SHOULD NOT BE
DISMISSED AS UNEXHAUSTED

Petitioner, a prisoner in state custody proceeding *pro se*, constructively filed¹ a Petition for Writ of Habeas Corpus (“Petition” or “Pet.”) on or about April 23, 2018. Petitioner challenges a 1993 conviction and sentence.

1. FAILURE TO EXHAUST

A. The Court may not consider a petition that includes unexhausted claims.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a federal court will not grant a state prisoner’s petition for writ of

¹ A *pro se* prisoner’s relevant filings may be construed as filed on the date they were submitted to prison authorities for mailing, under the prison “mailbox rule” of *Houston v. Lack*, 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988).

1 habeas corpus unless it appears that the petitioner has fully exhausted available
2 state court remedies with respect to each of the issues presented, or, unlike the
3 instant case, the state has expressly waived the exhaustion issue. *See* 28 U.S.C.
4 §§ 2254(b), (c); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 839, 119 S. Ct.
5 1728, 144 L. Ed. 2d 1 (1999); *Rose v. Lundy*, 455 U.S. 509, 522, 102 S. Ct. 1198,
6 71 L. Ed. 2d 379 (1982); *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887,
7 130 L. Ed. 2d 865 (1995) (*per curiam*). State remedies have been exhausted if a
8 petitioner has “fairly presented” each federal claim to the highest state court with
9 jurisdiction to review it, and a claim has been “fairly presented” if a petitioner has
10 set forth both the operative facts and the federal legal theory on which the claim
11 is based. *See, e.g., Duncan*, 513 U.S. at 365-66; *Anderson v. Harless*, 459 U.S. 4,
12 6, 103 S. Ct. 276, 74 L. Ed. 2d 3 (1982); *Picard v. Connor*, 404 U.S. 270, 275, 92
13 S. Ct. 509, 30 L. Ed. 2d 438 (1971). Thus, “for purposes of exhausting state
14 remedies, a claim for relief in habeas corpus must include reference to a specific
15 federal constitutional guarantee, as well as a statement of the facts that entitle the
16 petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162-63, 116 S. Ct. 2074,
17 135 L. Ed. 2d 457 (1996); *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). A
18 petitioner may also alert the state court to the federal basis of his claim by citing
19 “a case deciding such a claim on federal grounds” *Baldwin v. Reese*, 541
20 U.S. 27, 32, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); *Davis*, 511 F.3d at 1011.

21 The petitioner has the burden of demonstrating that he has exhausted
22 available state remedies. *See, e.g., Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir.
23 1982). However, the Ninth Circuit has held that, for purposes of exhaustion, *pro*
24 *se* petitions are held to a more lenient standard than counseled petitions. *See*
25 *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir. 2003); *Peterson v. Lampert*, 319
26 F.3d 1153, 1159 (9th Cir. 2003).

27 B. The Petition appears to be unexhausted.

28 Petitioner has failed to demonstrate that he has presented the current claims

1 to state court, since the only appeals that appear on record appear to be unrelated
2 to the claims he presents in this habeas petition, based on the recent passage and
3 implementation of California Proposition 57.

4 C. Neither exception to the exhaustion requirement is applicable.

5 AEDPA provides that the Court may consider an unexhausted claim if
6 “there is an absence of available State corrective process; or . . . circumstances
7 exist that render such process ineffective to protect the rights of the applicant.”
8 28 U.S.C. § 2254(b)(1)(B)(i)-(ii). Thus, if it were clear here that petitioner’s
9 unexhausted claim was procedurally barred under state law, then the exhaustion
10 requirement would be satisfied. *See Castille v. Peoples*, 489 U.S. 346, 351-52,
11 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989); *Johnson v. Zenon*, 88 F.3d 828, 831
12 (9th Cir. 1996). However, it is not “clear” here that the California Supreme Court
13 would hold that petitioner’s unexhausted claim is procedurally barred under state
14 law, if petitioner were to raise it in a habeas petition to the California Supreme
15 Court (which, being an original proceeding, is not subject to the same timeliness
16 requirement as a petition for review of a California Court of Appeal decision).
17 *See, e.g., In re Harris*, 5 Cal. 4th 813, 825 (1993) (granting habeas relief where
18 petitioner claimed sentencing error, even though the alleged sentencing error
19 could have been raised on direct appeal); *People v. Sorensen*, 111 Cal. App. 2d
20 404, 405 (1952) (noting that claims that fundamental constitutional rights have
21 been violated may be raised by state habeas petition). The Court therefore
22 concludes that there is neither an absence of available state corrective process nor
23 an existence of circumstances that render such process ineffective.

24 **2. ORDER TO SHOW CAUSE**

25 The Court orders petitioner to show cause in writing within 15 days
26 of the date of this order why the Petition should not be dismissed for failure to
27 exhaust. If available, petitioner should include a copy of his petition for review
28 to the California Supreme Court with his response to this order.

1 If petitioner fails to provide a timely response to this order, the Court will
2 recommend that the Petition be dismissed without prejudice for failure to exhaust.

3 IT IS SO ORDERED.

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5 DATED: May 22, 2018


6 /S/ FREDERICK F. MUMM
7 FREDERICK F. MUMM
8 United States Magistrate Judge
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